

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

ORIGINAL

In the Matter of

Review of the Pioneer's  
Preference Rules

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ET Docket 93-266

To : The Commission

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NOV 15 1993

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

JOINT COMMENTS

ADVANCED MOBILECOMM TECHNOLOGIES, INC.  
DIGITAL SPREAD SPECTRUM TECHNOLOGIES,  
INC.

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## TABLE OF CONTENTS

	<u>Page</u>
SUMMARY.....	1
I. STATEMENT OF INTEREST.....	2
II. RETENTION OF A PIONEER'S PREFERENCE PROGRAM WILL PROMOTE INNOVATION AND SPUR THE AVAILABILITY OF INVESTMENT CAPITAL FOR ENTREPRENEURS.....	7
III. MODIFICATION OF THE PROCESS FOR EVALUATING PIONEER'S PREFERENCE REQUESTS WILL SERVE THE PUBLIC INTEREST.....	13
IV. CONCLUSION.....	16

## SUMMARY

Spurred by the FCC's pioneer's preference program, Advanced MobileComm Technologies, Inc. ("AMT") and Digital Spread Spectrum Technologies, Inc. ("DSST"), through their parent and affiliated companies, have committed substantial levels of funding to the research, development and experimental testing of PCS products and services, and each has dedicated substantial technical and market resources to their efforts. The joint AMT/DSST PCS research and development to date has encompassed systematic and integrated technical, market and regulatory efforts in pioneering advanced and specialized PCS technologies and services. In its Tentative Decision addressing the 2 GHz pioneer's preference requests, the FCC found the AMT/DSST PCS architecture to be "innovative."

As set forth herein, AMT and DSST believe that, even with the commencement of auctions, the pioneer's preference rules may continue to serve a valuable role in spurring investment in basic research and development and innovation in new communications services and technologies in the U.S. Given the potential difficulties to be encountered by entrepreneurs and innovators in bidding at auction against large, deep pocket entrenched interests, AMT and DSST believe that retention of the pioneer's preference program, indeed, will further the specific goal articulated in the Budget Act of ensuring the continued participation of small businesses, businesses owned by members of minority groups and women and rural telephone companies in the provision of spectrum-based services. AMT and DSST thus do not

favor the repeal of the pioneer's preference program, either prospectively or retroactively.

AMT and DSST believe, however, that the Commission may find an adequate basis in the Budget Act to prospectively modify the pioneer's preference program to assure that the potential rewards of a pioneer's preference are reasonably related to the financial risks incurred by the preference applicant. In this respect, AMT and DSST suggest that the FCC may award bid preferences to a pioneer in a multiple of the total expenditures incurred in the pioneering activities. Legal and equitable uncertainties, however, render retroactive application of any such modifications questionable.

AMT and DSST unequivocally support the FCC's proposed procedural modifications to the pioneer's preference rules. The use of a "tentative decision" at the Notice of Proposed Rule Making ("NPRM") stage simply has not served the public interest because it improperly measures "winners" and "losers" at midfield and not at the goal line. As vividly illustrated by the Broadband PCS Order, the ultimate service rules adopted in a Report & Order ("R&O") may fundamentally differ from those proposed in the NPRM. Because the pioneering efforts of a preference applicant may be fairly judged only by the final service rules, a fundamental difference between the NPRM and the R&O likely will also dictate a different outcome in the pioneer's preference decisions.

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JOINT COMMENTS

Advanced MobileComm Technologies, Inc. ("AMT") and Digital Spread Spectrum Technologies, Inc. ("DSST"), by their counsel and pursuant to Section 1.419 of the Commission's Rules, 47 C.F.R. §1.419, hereby submit their Joint Comments on the Notice of Proposed Rule Making ("NPRM") in the above-captioned proceeding.<sup>1</sup> By the NPRM, the FCC has initiated a review of its pioneer's preference rules to assess the effect upon those rules of the enactment of Title VI of the Omnibus Budget Reconciliation Act of 1993 (the "Budget Act") providing the Commission the authority pursuant to Section 309(j) of the Communications Act to award Title III radio licenses through the use of competitive bidding.<sup>2</sup>

The Commission, in particular, has requested comment on whether its pioneer's preference rules should be repealed or modified in view of its newly-enacted auction authority. NPRM at paras. 11-12. In the event the FCC elects to retain the

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<sup>1</sup>Review of the Pioneer's Preference Rules (Notice of Proposed Rule Making), FCC 93-477 (October 21, 1993) ("NPRM").

<sup>2</sup>Pub. L. No. 103-66, Title VI, Section 6002(b), 107 Stat. 312, 392 (1993).

pioneer's preference rules, it has proposed to modify the procedures and standards under which preference requests are evaluated. NPRM at para. 13-17. The Commission, finally, has requested comment on whether any repeal or modifications to the pioneer's preference rules should be applied to the pending pioneer's preference requests in the 2 GHz broadband Personal Communications Services docket (General Docket 90-314) and in the 28 GHz Local Multipoint Distribution Service (CC Docket No. 92-297). NPRM at para. 19.<sup>3</sup>

#### I. STATEMENT OF INTEREST

Spurred by the FCC's pioneer's preference program, AMT and DSST, through their parent and affiliated companies, have committed substantial levels of funding to the research, development and experimental testing of PCS products and services, and each has dedicated substantial technical and market resources to their efforts. DSST is a subsidiary of Cylink Corporation ("Cylink"), a recognized leader in the design and manufacture of commercial spread spectrum radio products. DSST was formed by Cylink for the purpose of focusing Cylink's

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<sup>3</sup>The Commission has indicated that because the pioneer's preferences granted to Volunteers in Technical Assistance ("VITA") in the non-voice, non-geostationary ("NVNG") mobile satellite service below 1 GHz (ET Docket 91-280) and to Mobile Telecommunication Technology Corporation ("Mtel") in the 900 MHz narrowband PCS docket (GEN Docket 90-314 and ET Docket 92-100) were issued before enactment of the Budget Act, it will not apply any repeal or modification of the pioneer's preference rules to VITA or Mtel as a matter of equity. NPRM at para. 18. The Commission has further indicated that any revisions to the pioneer's preference rules in this proceeding will apply to the twelve preference requests before it for which tentative decisions have not been issued. NPRM at para. 20.

considerable spread spectrum technology, marketing and regulatory expertise on the research, development and experimental deployment of PCS products and services.

AMT is an affiliate of Advanced MobileComm, Inc. ("AMI"), one of the largest providers of Specialized Mobile Radio services in the nation, and a subsidiary of FMR Corp. which, together with its subsidiaries (collectively "Fidelity Investments or "Fidelity") is the nation's largest privately-owned investment management organization. AMT was formed to focus the operational expertise of AMI in emerging wireless communications technologies and the institutional experience of Fidelity Investments in managing a sophisticated telecommunications infrastructure into the PCS field.

During the course of the proceeding that led to the establishment of the pioneer's preference rules (General Docket 90-217), both Fidelity and Cylink expressed their belief that the pioneer's program was needed to ensure that innovators of new communications services and technologies were able to attract investment from the capital markets despite the uncertainties otherwise presented by the U.S. spectrum allocation and licensing process.<sup>4</sup> Indeed, in adopting its pioneer's preference rules, the FCC expressly took cognizance of Fidelity's comment that it previously had declined opportunities to venture with, or provide

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<sup>4</sup>See Comments of Cylink Corp., General Docket No. 90-217 (June 29, 1990); Comments of FMR Corp., General Docket No. 90-217 (June 29, 1990); Reply Comments of FMR Corp., General Docket No. 90-217 (July 30, 1990).

financing for, prospective communications innovators because of the uncertainties associated with the spectrum allocation and licensing process. Establishment of Procedures to Provide a Preference to Applicants Proposing an Allocation for New Services, 6 FCC Rcd. 3488, 3489 (1991) ("Pioneer's Preference Order"), recon., 7 FCC Rcd. 1808 (1992) ("Pioneer's Preference Reconsideration Order"), further recon. denied, FCC 93-116 (1993) ("Pioneer's Preference Further Reconsideration Order").

In concert with the FCC's proposal to implement a pioneer's preference program and the inquiry initiated by General Docket 90-314 to examine the potential establishment of U.S. personal communications services, AMT and DSST recognized the commonality of their approach to developing an optimal PCS marketplace. Perceiving the opportunity to develop a PCS system architecture optimized to serve emerging and specialized marketplaces, AMT and DSST entered into cooperative PCS research and development activities designed to blend their technical, regulatory, financial and operational expertise to attain research and developmental synergies otherwise unreachable.

The joint AMT/DSST PCS research and development to date has encompassed systematic and integrated technical, market and regulatory efforts in pioneering advanced and specialized PCS technologies and services, and in providing market opportunities in the PCS field for small and mid-sized entities as well as the



major players of the communications industry.<sup>5</sup> On May 1, 1992, AMT and DSST jointly submitted a "Request For Pioneer's Preference" (the "AMT/DSST Request") in General Docket 90-314 seeking the award of a pioneer's preference for their PCS research, development and experimentation which had resulted in the development of the highly-spectrally efficient PCS architecture employing Synchronous Code Division Multiple Access/ Frequency Division Multiple Access ("FDMA")/ Time Division Duplexing ("TDD") technology in a microcellular configuration. In its Tentative Decision addressing the 2 GHz pioneer's preference requests, the FCC found the AMT/DSST PCS architecture to be "innovative," a conclusion reached by the Commission for only five out of the total ninety six pioneer's preference requests submitted in the 2 GHz PCS proceeding.<sup>6</sup>

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<sup>5</sup>AMT and DSST have been active participants in every phase of General Docket 90-314, urging the Commission to accommodate within its vision of the family of PCS services the identified need for the provision of many advanced and specialized PCS services, including health care and home care, educational, public and personal safety and other applications. See Joint Comments of AMT/DSST on Notice of Proposed Rulemaking (November 9, 1993); Joint Reply of AMT/DSST to Comments on Notice of Proposed Rulemaking (January 8, 1993); Joint Comments of AMT/DSST on Tentative Decision (January 29, 1993); Joint Reply of AMT/DSST to Comments on Tentative decision (March 1, 1993); Joint Comments of AMT/DSST on WINForum and UTAM Proposals (June 21, 1993); Joint Petition of AMT/DSST For Further Rulemaking (August 25, 1993), General Docket 90-314.

<sup>6</sup>The FCC specifically found "many aspects" of the AMT/DSST Request to be "innovative." Amendment of the Commission's Rules to Establish New Personal Communications Services (Tentative Decision and Memorandum Opinion and Order), 7 FCC Rcd. 7794, (1992) ("Tentative Decision"). In its Tentative Decision, the Commission made a finding of innovation for only four other PCS reference requests -- those of American Personal Communications, Inc. ("APC"), Cox Enterprises, Inc. ("Cox"), Omnipoint

As set forth below, AMT and DSST believe that, even with the commencement of auctions, the pioneer's preference rules may continue to serve a valuable role in spurring investment in basic research and development and innovation in new communications services and technologies in the U.S. Given the potential difficulties to be encountered by entrepreneurs and innovators in bidding at auction against large, deep pocket entrenched interests, AMT and DSST believe that retention of the pioneer's preference program, indeed, will further the specific goal articulated in the Budget Act of ensuring the continued participation of small businesses, businesses owned by members of minority groups and women and rural telephone companies in the provision of spectrum-based services. AMT and DSST thus do not favor the repeal of the pioneer's preference program, either prospectively or retroactively.

AMT and DSST believe, however, that the Commission may find an adequate basis in the Budget Act to prospectively modify the pioneer's preference program to assure that the potential rewards of a pioneer's preference are reasonably related to the financial risks incurred by the preference applicant. In this respect, AMT and DSST suggest that the FCC may award bid preferences to a pioneer in a multiple of the total expenditures incurred in the pioneering activities. Legal and equitable uncertainties, however, render retroactive application of any

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Corporation ("Omnipoint") and PCN America, Inc. ("PCN America").  
Id.

such modifications questionable.

AMT and DSST unequivocally support the FCC's proposed procedural modifications to the pioneer's preference rules. The use of a "tentative decision" at the Notice of Proposed Rule Making ("NPRM") stage simply has not served the public interest because it improperly measures "winners" and "losers" at midfield and not at the goal line. As vividly illustrated by the Broadband PCS Order, the ultimate service rules adopted in a Report & Order ("R&O") may fundamentally differ from those proposed in the NPRM.<sup>7</sup> Because the pioneering efforts of a preference applicant may be fairly judged only by the final service rules, a fundamental difference between the NPRM and the R&O likely will also dictate a different outcome in the pioneer's preference decisions.

II. RETENTION OF A PIONEER'S PREFERENCE PROGRAM WILL  
PROMOTE INNOVATION AND SPUR THE AVAILABILITY OF  
INVESTMENT CAPITAL FOR ENTREPRENEURS

In its NPRM (at para. 7), the Commission states that it is "concerned that competitive bidding authority may have undermined the basis for our pioneer's preference rules." In particular, the Commission indicates that the principal rationale underlying the pioneer's preference program, i.e., the promotion of innovation in communications services and technologies despite the burdens imposed by the allocation and licensing process, may

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<sup>7</sup>Amendment of the Commission's Rules to Establish New Personal Communications Services, FCC 93-451 (October 22, 1993) ("Broadband PCS Order").

be negated by the adoption of auction authority because "under this new scheme the value of innovation may be considered in the marketplace and measured by the ability to raise the funds necessary to obtain the desired license." Id.

At the outset, during the brief period in which it has been in effect, the pioneer's preference program has proven enormously successful in accomplishing its stated purpose by unleashing tremendous creative energies in the research and development of new communications services and products. For example, the FCC issued over 150 experimental PCS licenses, and received almost 100 PCS preference requests, over 50 of which passed at least an initial review to determine their bona fides. Although no party can be assured of receiving a preference, and ultimately most will be disappointed, the potential for reward of a preference clearly spurred significant investment and research in PCS services and technologies.<sup>8</sup> As a result, the group of PCS preference applicants that survived the threshold review collectively have brought PCS to a more complete and advanced state in the U.S.

Of particular relevance, many small concerns, as well as large industry players, have participated in PCS experimentation and sought the award of pioneer's preferences.

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<sup>8</sup>The AMT/DSST cooperative PCS research and development, that has been recognized by the Commission as innovative, indeed, is precisely the type of activity that Fidelity advised the Commission in Docket 90-217 it earlier had declined to commence because of the uncertainties associated with the allocation and licensing process.

AMT and DSST do not believe that this collective wealth of research and development by diverse parties would have occurred without a pioneer's preference program even had auction authority otherwise existed.

AMT and DSST acknowledge that the implementation of auctions may reduce the uncertainty associated with obtaining a license within a new spectrum allocation. The pioneer's preference program, however, was implemented to promote innovation despite the uncertainties associated with both the allocation of spectrum to a new service and the assignment of licenses consistent with that allocation. The FCC thus stated in its Pioneer's Preference Order that "[o]ur objective in establishing a pioneer's preference is to reduce the risk and uncertainty innovating parties face in our existing rule making and licensing procedures, and therefore encourage the development of new services and new technologies."<sup>9</sup>

Even assuming arguendo that the implementation of auctions reduces the risks associated with the innovation of new spectrum-based services and technologies, it does not impact the risks associated with the rule making (allocation) process, including, for example, the risks of disclosure of innovative new services and technologies through the experimentation, research and public documentation necessary to support a spectrum allocation rule making. Nevertheless, AMT and DSST believe that these risks are substantial, particularly as they may include

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<sup>9</sup>Pioneer's Preference Order, 7 FCC Rcd. at 3492.

disclosure of new services and technologies at a nascent and vulnerable stage that may compete with existing entrenched service providers with deep pockets.

In AMT's and DSST's opinion, the implementation of auctions will not by itself provide adequate assurance that an innovative party will be able to obtain a license, even if that party is able to obtain financing for its research and development in the capital markets. Although the auctions assure that an innovative party may bid for a license, it does not assure a successful outcome for that bid. A party proposing a new service that would increase competition to an existing service, for example, may sit at the auction table with the entrenched interests from the existing service. While the innovator presumably could obtain in the capital markets sufficient financing to bid fair market value for the license, it may nonetheless be unable to compete with the entrenched interests with the incentive to bid the greater of (1) the fair market value of the license or (2) the value of acquisition of the license in minimizing competition with the entrenched service and in maximizing the return on embedded technology. In the latter case, the public interest clearly would not be served by the inability of the innovator to outbid its potential competitors at auction.

Given these concerns, AMT and DSST believe that the prospective retention of a pioneer's preference program would serve valid public policy goals and would continue to spur the

innovation of new services and technologies.<sup>10</sup> AMT and DSST recognize that the implementation of auctions may provide a basis for the modification of the pioneer's preference program and, in this respect, suggest that the FCC prospectively consider awarding a bid preference in a multiple of the research and development expenditures of the pioneer. In this manner, the FCC may continue to spur the availability of capital to prospective innovators and ensure that the return for pioneering work is reasonably related to the risks incurred by the applicant.

AMT and DSST, moreover, strongly urge that the Commission not repeal the pioneer's program retroactively. Congress has not directed the FCC to take such action. Indeed, new Section 309(j)(6)(G) expressly provides that "Nothing ... in the use of competitive bidding shall be construed to prevent the Commission from awarding licenses to those persons who make significant contributions to the development of a new telecommunications service or technology." Because the Commission is clearly not compelled by the auction legislation to repeal the pioneer's preference program, any such repeal, even if otherwise legally permissible, must rest upon sound and reasoned public policy.

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<sup>10</sup>AMT and DSST view any prospective repeal of the pioneer's preference program because of auctions as premature until an adequate sampling of auction results is available to ascertain the impact of auctions on the ability of small businesses and businesses owned by members of minority groups and women to successfully bid for licenses.

Many parties, including AMT and DSST, have expended significant resources and efforts in pursuing 2 GHz PCS pioneer's preference requests. The public clearly has benefitted from the collective experimentation of the PCS pioneer applicants that was responsive to the pioneer's preference program. The retroactive repeal of the pioneer's preference program, however, would deprive these preference applicants even of fair consideration under the preference rules. AMT and DSST, accordingly, believe that retroactive repeal of the preference rules would not constitute sound policy.

As a legal matter, the retroactive application of a repeal of the pioneer's preference rules ultimately must meet the Congressional intent test established in Bowen v. Georgetown University Hospital, 488 U.S. 204 (1988) ("Bowen"). In Bowen, Justice Kennedy, writing for a unanimous Court, stated that "[r]etroactivity is not favored in the law." and that "a statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms." See Neild v. District of Columbia, 110 F.2d 246, 254 (D.C. Cir. 1940).



### III. MODIFICATION OF THE PROCESS FOR EVALUATING PIONEER'S PREFERENCE REQUESTS WILL SERVE THE PUBLIC INTEREST

In the event that it retains the pioneer's preference program, the Commission proposes to implement administrative changes to refine the process by which pioneer's preference requests are evaluated. NPRM at paras. 13-16. In particular, the FCC proposes to eliminate the public notice specifying a cut-off date for submission of preference requests prior to Commission initiation of an inquiry or rulemaking proceeding. The Commission further proposes to modify its process by eliminating the "tentative decision" stage.

AMT and DSST fully concur with these proposed modifications to the process for submission and evaluation of preference requests. In AMT's and DSST's experience, any party undertaking sincere attempts at qualifying for a pioneer's preference through the innovation of new communications services and technologies most likely will be sufficiently informed of relevant FCC processes to ascertain the appropriate timing for submission of its preference request. In any event, with the proposed modification of Section 1.402(d), that responsibility clearly will fall upon the prospective pioneer. As the Commission suggests, the public notice of a cut-off specifying a deadline for submission of requests for particular services, therefore, principally serves to attract speculative and insincere submissions. In turn, those speculative requests consume scarce Commission resources, delay the decision on sincere requests and otherwise dilute the efficacy of the

pioneer's preference program in attracting investment capital for serious proposals.

AMT and DSST further agree that issuance of a "tentative decision" specifying tentative preference grants and denials in conjunction with a NPRM does not serve the public interest. The Commission consistently has made clear that the fundamental decision by which the results of pioneering efforts must be measured is the Report & Order implementing a new spectrum allocation and adopting service rules for assignments within that allocation.<sup>11</sup>

As the Commission is well aware, oftentimes the rules adopted by the R&O vary substantially from those proposed in the NPRM. The Broadband PCS Order, for example, significantly varies from the earlier NPRM in General Docket 90-314 by implementing an allocation of 120 MHz for licensed PCS services, including four 10 MHz assignments.<sup>12</sup> The tentative decisions reached regarding the 2 GHz PCS preference requests, however, rest upon the initial proposed allocation of 90 MHz in three 30 MHz assignments. That Tentative Decision, therefore, predicated the tentative denial of certain preference requests, including the AMT/DSST Request, based upon a perceived incompatibility with the NPRM's proposed spectrum allocation.<sup>13</sup>

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<sup>11</sup>See Pioneer's Preference Order, 7 FCC Rcd. at 3494.

<sup>12</sup>Broadband PCS Order at paras. 31-63.

<sup>13</sup>Tentative Decision at para. 30.

Accordingly, AMT and DSST believe that the "tentative" grant or denial of preference requests at the NPRM stage prematurely judges the requests without the benefit of the full public record compiled on the NPRM. A tentative denial, moreover, may serve to dampen the ability of prospective pioneers to continue to attract needed investment capital to continue to pursue their requests until the conclusion of the process. Conversely, a tentative grant may give rise to an unwarranted expectation or sense of entitlement in the pioneer applicant or in the financial community.<sup>14</sup> In both cases, the tentative judgments shade the ability of pioneer applicants to aggressively prosecute their requests and, in AMT's and DSST's view, influence the balance of the proceeding. Finally, the issuance of a tentative decision which must be revisited essentially de novo at the R&O stage has not proven to be an efficient use of scarce administrative resources.

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<sup>14</sup>In its Tentative Decision ( at n.20) concerning 2 GHz pioneer's preference requests, the Commission stressed that its tentative decisions "both granting and denying pioneer's preference requests are tentative, not final, and we will carefully review comments before reaching a final determination."


IV. CONCLUSION

For these reasons, AMT and DSST urge that the FCC retain its pioneer's preference program consistent with the principles described above.

Respectfully submitted,

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